No. 80-94

AUG 15 1980

MICHAEL RODAK, JR., CL

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

COMPANIA MARITIME NAVEGACION NETUMAR, S.A.,

Petitioner,

—against—

SAM IRIZARRY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

Where the facts in evidence and as found by the jury, namely: That Petitioner's ship came into port covered with snow and ice and containers in the hold blanketed with ice; that the longshoremen were required to walk on top of containers and unhook same when landed on the stringpiece of the pier and so could not avoid the dangerous condition; that ice on top of the container was extremely hazardous; that by custom and practice shipowner had the duty and the ship's crew was required to clean off the ice and to make the place of work reasonably safe; that the longshoremen were never required to nor did they clean off the ice; that when complaints were made to the ship's First Mate about the dangerous conditions he shrugged, walked away, and the ice was never removed.

The questions presented are:

1. Should the verdict be disturbed on appeal where the jury found shipowner failed to exercise reasonable care under these circumstances and was negligent?

2. Where shipowner does not take exception to the jury charge, should there be a reversal on appeal because of possible theoretic differences between the Circuits as to ship's duty derived from standards of care, when:

> (a) There is no conflict under the facts presented and the ship's duty was derived from custom and practice in the Port of New York and not from the "standard of care", and
>
> (b) On the facts in evidence as presented to the jury there is no conflict between Circuits and plaintiff would recover damages in any Circuit.

3. Is shipowner relieved of liability for their negligence when they turned over to longshoremen a hatch with cargo of containers then in an icy, dangerous condition which causes injury to a workman when shipowner could not rely on stevedore correcting the condition since by practice and custom ship's crew had sole responsibility for removing the ice?

4. Since the Federal Safety Regulations require that slippery conditions be eliminated as they occur and the icy condition on the container tops occurred prior to the longshoremen boarding the vessel, should the shipowner be considered in violation of such regulation here?

5. Should this court disagree with and overrule the Supreme Court holding in *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256 (1979) so that any negligence on the part of stevedore relieves shipowner of their liability for their negligence?

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I.

Statement of the Case

1. *Facts*

The Petition here should be denied since it is based upon misstatements of fact and serious errors in law. Petitioner tailors the facts to fit the law as they would like it to be and then ask this Court to overrule the Supreme Court and change the law to their liking.

The Petitioner's "facts" are substantially different in content and import from those facts ascertained from the trial record by the Trial Court (see charge to the jury in Appendix 1, Respondent's Brief) as well as by the Circuit Court as set forth in their opinion (Appendix B to the Petition 4a-6a).

This case involves a working surface which was icy and slippery and so supplied and provided by shipowner to

longshoremen who had to perform their work thereon. The container tops were so slippery that at times the men would have to crawl on their knees. The condition was not created by the longshoremen but was in existence at the time the longshoremen came on board to perform their work of unloading the vessel.

The dangerous condition did not arise as a result of the work of handling of cargo by the longshoremen. They were on board to load and unload and not to do housekeeping nor to correct the dangerous conditions on board defendant's vessel. The expertise of stevedores for which they were hired did not play any part in the creation of the hazard. The testimony shows that it was the ship's crew that was required to remove the ice on the containers and not the duty of the longshoremen to do so.

The longshoremen did not undertake to correct the condition but looked to the shipowner to do so. Complaints were made to the First Mate about the slippery condition but "He looked at me and he looked at the containers and he shrugged his shoulders and he walked away."

The jury found that shipowner did not act in a reasonable manner under the circumstances and that it was negligent. It also found that shipowner had either actual or constructive notice of the conditions complained of.

Despite the foregoing, shipowner asserts distortedly that plaintiff should not succeed.

The testimony was simple. Plaintiff, a longshoreman, was injured on February 1, 1977 at about 7:45 P.M. while on top of a container which was being discharged from Hatch No. 1 of defendant's vessel. The container top was slippery with ice. He slipped and fell on the container and then down to the stringpiece of the pier sustaining injuries.

The container was a box, 20 feet by 8 feet by 8 feet. It had eyes at each corner into which hooks would fit. To discharge the container, four 20-foot wires with a hook at the end of each was used. These hooks fit into the eyes of the container and all four wires were connected to the cargo hook. The container would be taken out of the hatch and landed on the stringpiece of the pier. In order for it to be hooked up for removal off the ship, the longshoremen had to go on top of the containers. When landed on the stringpiece, the longshoremen had to walk on top of the containers to take off the hooks.

When the ship came into New York it was full of snow and ice. The containers on the deck had snow thereon. The containers below deck had ice and slush on them. After removing the containers on deck, at about 5:00 P.M. the hatch was opened. There was ice, broken ice and water on top of these below deck containers.

When the hatch was opened, the First Mate was standing on deck looking down onto the containers.

It was the ship's duty to clean the ice and snow off the containers. It was the longshoremen's job to load and unload the ship. They had nothing to do with the removal of snow and ice on board. The longshoremen never remove snow or ice from the containers or anywhere else.

When the hatch was opened the conditions on the containers were very hazardous, icy and slippery. The containers had a blanket of ice.

When the containers below deck were seen, a witness testified that he complained to the First Mate. He testified:

"Q. What was he doing when you complained to him?

A. He was standing and he was looking in the hatch.

Q. What did you say to him?

A. I said—I said, 'What are we supposed to do, work like this, with this snow and ice?', and we have to get on these containers which they're sometimes four high. It's a 40-foot fall if you fall. It's very hazardous. I said, 'How are we supposed to walk on them?'

Q. What did he say, if anything?

A. He looked at me and looked at the containers and he shrugged his shoulders and he walked away.

Q. Did you tell me approximately what time of the day this was?

Q. Well, I could not be sure. It was towards the evening or late afternoon.

Q. Did you do this on one occasion or on more than one occasion?

A. Other than one occasion." (Trial Transcript 54-55)

(It is this that the Petitioner, from the safety of his office, characterizes as "a rhetorical expression of irritation" about seasonal weather effects, and erroneously claims that the lower court held the shrug to be sufficient "to shift the responsibility for the conduct of the discharge operations"—p. 4 Petition. Such position is pure fantasy.)

The dangerous condition of the ice and snow on the container tops was open and obvious. Complaints were not made to the Hatch Boss because it was an obvious condition and the latter saw it.

In removing the container from the ship, it was placed on the stringpiece alongside the ship to be unhooked. When plaintiff went onto the container for that purpose, he took three steps, slipped and fell thereon and then fell down onto the stringpiece.

Shipowner argues that they engage stevedores such as plaintiff's employer "to load and unload cargo" from their vessel. Once more it becomes necessary to point out that the use of the container top as a walking and working surface is not loading and unloading cargo. It is not the handling of cargo but the performance of housekeeping chores that is involved.

Shipowner's denial that they have any control where longshoremen work is fallacious. They furnished an unsafe place of work and by doing so they violated their duty that they owed to plaintiff. For them now to claim that they delegated their duty to stevedore is incredible. If stated correctly, they claim the ship can delegate its responsibility or liability for the consequences of its violation of its duty. When they speak of a non-delegable duty equal to the warranty of seaworthiness they are distorting the facts and law. They cannot delegate their liability for their own negligence.

In our case it is the shipowner that was and is in the best position to prevent the dangerous conditions from arising again and similar accidents from occurring. It is they who were in control of the vessel and its cargo when the condition was created. They knew that unless some special precautions were taken that on a winter crossing ice would form on the cargo and longshoremen would have to walk thereon. Such knowledge should have brought forth a more positive attempt by shipowner to "control the conditions". They could have insulated their holds to a greater and better extent; could have covered the cargo with canvas or tarpaulins; could have spread non-skid material on each container before ice formed thereon; could have placed non-skid material on the cargo after the ice formed; could have made inspections to ascertain the condition, corrected same or at least warned the long-

shoremen; and the like. Obviously shipowner was in the best position to prevent the accident from occurring. They did none of the foregoing.

2. *The Charge to the Jury*

The Court charged the jury* that plaintiff must prove that the accident occurred in the manner claimed by him; that the defendant was negligent and its negligence was the proximate cause of the accident. Negligence was defined as the doing of some act that a reasonably prudent person would not do or the failure to do something that a reasonably prudent person would do under the same or similar circumstances. It is the failure to use ordinary care under the circumstances.

The jury was charged that the plaintiff had to prove the claimed manner of the happening of the accident which was as follows:

Plaintiff was required to work on top of a container; that he slipped and fell because of ice and melting slush on the top of the container; that the ship's crew had failed to remove the ice and slush; that he was injured because the shipowner breached its duty to provide him with a safe place to work. He claimed that the ship's First Mate knew that there was ice and slush on the tops of the container which were being unloaded from the ship and shipowner should have removed same. Its failure to do so was a violation of its duty to supply him with a reasonably safe place to work.

The Court reiterated in its charge that shipowner would be liable for unsafe working conditions of which it was or should have been aware and for any negligence by the

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* Pertinent portions of the charge to the jury are reproduced in Appendix 1 annexed to this brief in opposition.

ship's crew; that plaintiff must establish that the Mate knew that the ice and slush was on the top of the container and negligently failed to have it removed; that the ice had been on the top of the container for such a period of time that it should have been discovered and removed by the ship's crew in the exercise of reasonable care under the circumstances; that plaintiff contends that prior to the accident a witness advised the Mate of the presence of ice on the containers and that the Mate shrugged and walked away. If the jury believed the testimony of this witness, they could find that shipowner knew that there was ice on the container and its failure to remove same may be considered negligence for which shipowner would be liable.

The jury was charged that plaintiff did not assume the risk of his employment if the injury resulted from the negligence of shipowner. Comparative negligence was charged.

Following the charge, shipowner's counsel stated it had *"no exceptions"* thereto.

Shipowner requested a further charge that by ". . . employing the stevedore to discharge the vessel that the stevedore has certain responsibilities under the law which shipowner has a right to assume that the stevedore will perform." The Trial Court refused to so charge as *Edmonds* v. *Compagnie Generale Transatlantique, supra,* holds that the negligence of the shipowner stands on its own two feet and that such a charge would not be correct as a matter of law; and that it would confuse the jury.

The Court might have also added that the requested charge in the language used was irrelevant to the issues; that the negligence of the stevedore should not be imputed to the plaintiff; and that since shipowner and stevedore are concurrently negligent here, the only question is,—did shipowner exercise reasonable care under the circumstances?

3. *The Opinion of the Circuit Court*

The Circuit Court affirmed the court below stating that there was evidence from which the jury could have concluded that:

1. Plaintiff's job required him to walk across the top of the container; 2. He slipped due to ice and slush on the top of the container that had accumulated *before* the ship reached port; and 3. The vessel had actual notice of this condition.

The Court then stated that a Shipowner is not liable to a longshoreman

> "for physical harm caused by any condition whose danger is known or obvious to the longshoreman, unless the shipowner should anticipate the harm despite such knowledge or obviousness. Restatement (Second) of Torts §343A; *Napoli* v. *Hellenic Lines, Ltd.*, 536 F.2d 505 (2d Cir. 1976). Both notice to the shipowner and the necessity for Irizarry to walk across the container are established by the evidence." (5a)

The Court pointed out that the dangerous condition involved here was *not* caused by and under the control of the stevedore and longshoremen. That

> "*Giglio* v. *Farrell Lines, Inc.*, 613 F.2d 429 (2d Cir. 1980) recognized, 29 C.F.R. 1918.91(c) ("Slippery conditions shall be eliminated as they occur.") does not relieve the vessel "from responsibilities or duties now placed upon them by law, regulation or custom." 29 C.F.R. §1918.2(b). Moreover, the Joint Maritime Safety Code, Part C, §1 provides, "The owner, master and officers of the vessel shall supply and maintain in safe condition for use all ship's gear, equipment,

tools and *work spaces* which are to be used in stevedoring operations." (6a)

II.

Reasons for Denying the Petition for a Writ of Certiorari.

1. *The Modern View of the Law as Applied in the Second Circuit*

The decision of the circuit court in our case is based upon *Napoli* v. *Hellenic Lines, Ltd.*, 536 F. 2d 505 (2 Cir. 1976); *Lopez* v. *A/S D/S Svendborg*, 581 F. 2d 319 (2 Cir. 1978); and dissenting opinion of Judge Oakes in *Giglio* v. *Farrell Lines Incorporated*, 613 F. 2d 429 at 436-438 (2 Cir. 1980).

In *Napoli*, plywood on deck cargo had snow thereon and hence, was slippery. Plaintiff had to stand and walk on it in connection with the performance of his work as signalman. He slipped and fell. The Court stated:

> "[8] As we proceed with our task of adopting appropriate land-based principles of negligence for application under the LAHWCA, we would be lacking in wisdom if we turned our backs on the changes which increased social awareness has brought about in traditional concepts of liability. Accordingly, we believe that where a shipowner has notice of an obviously dangerous condition, his duty of care to longshoremen exposed to such danger should be as set forth in § 343A of the Restatement of Torts above quoted." (509)

The Court rejected the *Traditional* interpretation of Sec. 343A since that incorporated contributory negligence as a

bar to the action and charged the injured with assumptions of risk.

Eliminating these restrictions, the Court applied the *Modern* view as set forth in Comment—subpar. (f) under sec. 343A. See also Prosser, Law of Torts, 4th Edition Chap. 10, par. 61 pp. 394-395. The court stated:

> "[5] Where dangers are unreasonable, their obviousness, standing alone, should not necessarily relieve a defendant of all responsibility for their presence. Although the invitee (or in this case the employee) may be under a duty to avoid harm likely to result to him from open and obvious dangers, he may not be in a position fully to appreciate the risk or to avoid the danger even though aware of it. For instance, his attention may be distracted or his duties as an employee may require his unavoidable exposure to it." (508)

The Circuit Court held that the rule pertaining to shipowners generally, where a condition is obvious, the question is whether (1) a longshoreman fully appreciated the condition at the time of the occurrence, for example, his attention was distracted, or (2) *he could not have avoided it since his job required him to work there.* In this connection the Circuit Court said that a man need not leave his job or face trouble for delaying the work if he sees a dangerous condition.

The Court stated:

> "The thrust of Napoli's testimony was that he had to stand on the plywood in order to carry out his duties of giving signals to the winchmen. Thus, it might be argued that *if this was the only place for Napoli to work and carry out his job, the vessel might reason-*

> *ably anticipate that he would use it despite its obvious danger,* since the only altrenatives would be to leave his job or face trouble for delaying the work." (p. 509) (Emphasis added)

The Circuit Court further stated that since shipowner is best able to anticipate and prevent harm from obvious dangers on a ship, he should be under a duty to take corrective action.

Here Irrizarry could not avoid exposure to the dangerously slippery condition of the top of the container where he had to walk to perform his work. The Shipowner knew of the condition and the jury so found. Under such circumstances, the Shipowner had a duty to take corrective action to make the place of work safe. To hold otherwise would be contrary to the House and Senate Committee Reports pertaining to the 1972 Amendments of the Act wherein they expressed their intent to hold Shipowner liable where, for example, there's a slippery condition on the deck.

The dangerous condition was not created by plaintiff or stevedore.

Furthermore, as the Circuit Court stated, there was testimony that it was the Shipowner's duty to clean off the ice. The longshoremen did not do that work and they have a right to rely on the ship's crew performing their work in a non-negligent manner,—not the reverse as Shipowner erroneously claims.

The Circuit Court held shipowner not to be insulated from the application of OSHA Regulations. See also *Bachtel* v. *Mammoth Bulk Carriers, Ltd.*, 605 F. 2d 438 (9th Cir. 1979), wherein the Court stated at 446:

> "In general, the regulations, which were promulgated under 33 U.S.C. § 941, were intended to eliminate the

> risk of injury to all longshoremen and not just to those who exercise prudence. *Denny* v. *Jugoslavenska Oceanska Plov,* 455 F.2d 1277, 1278 (CA5 1972). *The regulations* might prove helpful in suggesting types of measures deemed necessary for maintenance of a safe ship. *Darwin* v. *United States,* 435 F.Supp. 501, 507 (N.D.Cal.1977), and *are binding on the shipowner where he knew or should have known of a violation of the safety regulations. Anuszewski* v. *Dynamic Mariners Corp. Panama,* 391 F.Supp. 1143, 1145 (D. Md. 1975), *aff'd* 540 F.2d 757 (CA4 1976)".

See also, *Johnson* v. *A/S Iverans Rederi,* 613 F. 2d 334, 340 (1 Cir. 1980) wherein the Court stated that OSHA Regulations would continue to apply to *all* parties and may, in certain circumstances, define the appropriate standard of care.

As for reliance by Shipowner that stevedore would act to correct the condition, Judge Oakes in *Giglio,* 613 F.2d at 437, stated:

> An important factor in assessing the likelihood that the stevedore will act is the customary division of responsibilities with respect to a given risk.

Speaking of the ship's duty to correct the dangerous condition and make safe the area where the longshoremen had to work, the opinion states at 438:

> "That it is the *ship's* duty is substantiated by Part C §§ 1, 37 and 38 of the Joint Maritime Safety Code prepared by the New York Shipping Association, Inc., the International Longshoremen's Association, and Port of New York Joint Safety Committee, which surely qualify under the Safety and Health Regulations as a 'regulation or custom' and which read as follows:

> 1. The owner, master and officers of the vessel shall supply and maintain in safe condition for use all ship's gear equipment, tools and work spaces which are to be used in stevedoring operations."

It should also be noted that Petitioner's attempted application of Sec. 1918.91(c) of the Safety Regulations is error. That Section states that "slippery conditions shall be eliminated *as they occur.*" The regulation is directed to the time when it occurs. Slippery conditions on board ship prior to turning same over to stevedores impose a duty on shipowner to correct the condition for it is their duty to furnish a reasonably safe place to work.

Thus, having a duty to alleviate the dangerous condition, they acted in a negligent manner breaching their duty and causing plaintiff to be injured. To have them escape liability for their breach of duty would be unconscionable under the facts in our case. Were this Court to agree with Petitioner's view, no cases could ever be brought against shipowner for their negligence, contrary to Congressional intent. It would likewise reverse this Court's opinions and in particular, *Kermarec* v. *Compagnie General Transatlantique,* 358 U.S. 625 (1959) and *Edmonds* v. *Campagnie Generale Transatlantique,* 443 U.S. 256 (1979).

In the latter case this Court held that the Amendment to the Statute did not override or modify the rule that the longshoreman may recover the total amount of his damages from the vessel if the latter's negligence is even a minor contributing cause of his injury, and if the stevedore is partly to blame. In arriving at its conclusion, the Court stated that Congress did not intend to modify the pre-existing rule that a longshoreman who is injured by the concurrent negligence of the stevedore and the ship may recover for the entire amount of his injuries from the

ship. It points out that the Congressional Committee Reports repeatedly refer to the refusal to limit the shipowner's liability for negligence, which they felt left the vessel in the same position as a land-based third party whose negligence injures an employee. Because an employee generally may recover in full from a third party concurrent tort feasor, these statements are hardly indicative of an intent to modify the law then in existence.

Although there may be inequities that may arise there should not be any shifting of the burdens onto the longshoremen. The Court makes clear that such burden of inequity should not be placed on the longshoreman because the Act seeks to protect him.

The Supreme Court further stated that the employer's fault is not imputed to the employee and *there may be no diminution of recovery due to the employer's fault but only due to his own fault.*

Since the Supreme Court felt that whatever rights the parties had at the time just prior to the 1972 Amendment still appertain, it should be noted that the Supreme Court, in *Kermarec* v. *Campagnie Generale Transatlantique,* 1959, 358 U.S. 625, set forth its own negligence standard as "the owner of a ship—owes to all who are on board for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances of each case". (632)

Petitioner confuses the issues in a vain attempt to change the law. In line with that approach they completely ignore *Edmonds.* Many of the cases cited by Petitioner are based on reasoning rejected in *Edmonds* and their conclusions are in conflict with this opinion. It would have been important material and of benefit to this Court had Petitioner distinguished that opinion.

The duty of shipowner to correct the dangerous condition under the facts in our case arises from a number of sources including:

1. *Napoli* and Sec. 343A of the *Restatement of Torts, Second.* (Modern rule)

2. The practice in the Port of New York where only the ship's crew does the cleaning and removal of the ice. The longshoremen do not do that work.

3. Custom in the Port of New York for shipowners to remove slippery conditions and ice.

4. OSHA Regulations.

It is presumed that "the standard of care" applied to shipowner would also determine its duty. Under the facts in our case, regardless of definition of 'standard of care,' shipowner breached its duty at least arising out of the custom and practice in New York. Under the circumstances shipowner is liable for injuries and damages that result from their failure to exercise reasonable care.

To all intents and purposes, shipowner has an independent obligation to furnish longshoremen with a reasonably safe place to work and to see that a longshoreman is not exposed to harm.

Furthermore, the Congressional Committees' Reports and thus the intent of Congress was not to lessen shipowner's duties owed to longshoremen and Congress felt it would increase the safety on board vessels by holding shipowner liable for its negligence.

> "Permitting actions against the vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the

> same care as a land-based person in providing a safe place to work. Thus, nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action which it knows or should have known about a dangerous condition." (Sen. Report, p. 10)

And the care required is reasonable care commensurate with the dangers to be encountered. It should be noted that the Committee stated that "longshoring remains one of the most hazardous types of occupations" so that the standard of care is necessarily a high degree of care.

Under the facts in our case, in view of the custom and practice in the Port of New York, the primary or perhaps the sole obligation to remove the ice and make the place of work safe was on the shipowner.

To hold that plaintiff could not recover against shipowner on these facts in any Circuit under any standard of care that is applied, would make a mockery of Congressional intent and in particular the example set forth in the Congressional Committee reports.

2. *The Non-Existent Conflict Between Circuits Under the Facts Presented*

Petitioner sets up a false issue of standard of care. They failed to relate the various case holdings to the facts in our case. By misstating facts and misinterpreting the law, they confuse the real issue here.

Basically, they seek to show a conflict between the various Circuits alleging that Sec. 343A of the Restatement was applied by the Second Circuit in our case whereas others have rejected the application of said section or "refined the application of the Restatement to longshoremen suits and developed the present conflict" (p. 14, Petition) with the Second Circuit.

Typical of Petitioner's erroneous reasoning is found at the very beginning of Point I. In discussing the First Circuit (p. 6, 7 Petition) *Anderson* v. *Iceland Steamship Company,* 585 F. 2d 1142 (1 Cir 1978), is cited for the proposition that Sec. 343A is inapplicable to a case where injury does not occur on the vessel. They urge a fictitious rule of law based on "situs."

Anderson is not analogous to our case and the above proposition is not applicable. That case involves a dangerous condition created by longshoremen on a pier upon moving cartons of frozen fish by hilo on the pier *after* they had been discharged from the vessel. The cartons had been placed on pallets on the ship by longshoremen and were so discharged onto the pier. Thereafter, forklifts carried the pallets with the cartons to Anderson's desk for checking. While being so moved by the forklift, some cartons fell to the pier floor. Wheels of the tractor rode over the cartons resulting in fish juices and slime being spread on the pier making it slippery under foot. The condition existed on the pier for two days. Anderson slipped and twisted his back.

The testimony showed that the longshoremen stacked the cartons on the pallet; it was they who had the duty and were required to place open and torn cartons into larger or master cartons for unloading but failed to do so. If the cartons were wet and soft, it was their duty to place same into drums for discharging. Furthermore, it was they who had the duty to maintain the pier; and it was their forklift and operator who spread the slime on the pier. The shipowner had no duties with respect to maintenance on the pier.

Thus, a slippery condition was created on the pier. There was no unsafe condition aboard ship as a result of slime and no difficulty in discharging the pallets onto the pier.

The ship's officers and crew did not know of the condition created on the pier.

The First Circuit held that in view of the absence of notice to shipowner and because the dangerous condition on the pier was created by the longshoremen after the cargo had been discharged from the vessel and after it was moved by the forklift, shipowner had no duty or liability for the breach of a duty to anyone injured on the pier. The Court therefore held that Sec. 343A was not applicable. The Court however said that when a dangerous condition is created off the shipowner's premises which is not "integrally related with conduct" on board the ship, supervisory control by shipowner is lacking.

It is this type of occurrence created on a pier unbeknownst to shipowner that gave rise to the First Circuit's stating that a shipowner could not be held liable under 343A for injuries on the pier.

It should be noted that our case does not involve a condition on the pier. It does involve a condition of cargo at a time integrally connected with the conditions on board ship; and a condition known to shipowner. It should also be noted that in *Delos Santos* v. *Scindia Steam Navigation Co., Ltd.,* 598 F.2d 480 (9th Cir.), the rule stated therein sets forth the standard of care as follows: "A vessel is subject to liability for injuries to a longshoreman working *on or near* the vessel caused by conditions on the vessel . . ." (485).

Thus, the accident need not occur on the vessel to find liability on the part of the shipowner.

Despite the foregoing, Petitioner proceeds to cite *Johnson* v. *A/S Ivarans Rederi,* 613 F. 2d 334 (1 Cir. 1980) claiming that that case enunciates the law to be applied in cases where the injury has occurred on the vessel. They

ignore the fact that *Johnson* follows *Santos*. They also fail to inform the Court that in *Johnson*, the First Circuit rejected the application of Sec. 343A (the Traditional view) because it was intermixed with assumption of risk and contributory negligence as a bar to the action. Since this contravened the intent of Congress, the Circuit Court felt that the *Kermarec* standard of care, namely, "reasonable care under the circumstances" should apply. The Court noted that congress intended that the standard of care must be designed to have the maximum, positive impact on safety and it must reflect the fact that the LHWCA is a remedial statute enacted to protect the longshoremen and not the vessel. They cite *Edmonds* v. *Compagnie Generale Transatlantique, supra* in support of their position. It is because of such important considerations the First Circuit adopted the standard of care owed longshoremen by the vessel which called for "reasonable care under the circumstances" which permits a finding of negligence upon showing: 1. That the vessel knew or should have known of the condition aboard ship which led to the injury; 2. That such condition would pose an unreasonable risk of harm to longshoremen; 3. That the vessel failed to exercise reasonable care "to protect the longshoremen against that danger."

The foregoing is consistent with the charge to the jury in our case.

It is of interest to note that the Court viewed Secs. 343 and 343A of the Restatement to be more favorable to the vessel than the standard of care that they favored. Since the charge to the jury there was based on Sec. 343A and the jury verdict was nevertheless in plaintiff's favor, the Court felt that it would also have found the vessel solely negligent under the standard of care adopted by the First Circuit and hence, the verdict should not be disturbed.

Obviously, Petitioner has missed the point and were plaintiff's case tried in the First Circuit, under the standard set forth in *Johnson,* plaintiff would have recovered in any event. Hence, there is no conflict of interest between the First and Second Circuits as it pertains to the facts in our case and in the result that would follow.

Petitioner is clearly in error as to the meaning and import of the cases in the Third Circuit. They have overlooked *Griffith* v. *Wheeling-Pittsburgh Steel Corp.* 610 F.2d 116 (3 Cir. 1979). There the Court analyzed the "pattern of our earlier decisions" (124) which included *Rich* v. *United States Lines,* 596 F.2d 541 (3 Cir. 1979) *and Hurst* v. *Triad Shipping Co.,* 554 F.2d 1237 (3 Cir.) cert. den. 434 U.S. 861 (1977). The Court commented that these decisions "do not, however, speak directly to the scope of the vessel's independent duty under §905(b) to 'exercise the same care as a land based person in providing a safe place to work.'" (124) *Griffith* adopted the standard of care which imposes on the shipowner the duty to exercise reasonable care under all the circumstances in the case.

The defendant barge owner argued in *Griffith* against this standard of care, claiming that:

> ". . . a vessel should not be held liable in negligence under §905(b) if it has delivered the ship 'in such condition that an expert and experienced stevedoring contractor, mindful of the dangers he should reasonably expect to encounter' will be able to load or unload the vessel safely by excercising 'ordinary care under the circumstances.'" (124)

This is the same approach that Petitioner takes by urging the application of *Hugev* v. *Dampskisaktieselskabet International,* 170 F.Supp. 601 aff'd 274 F.2d 875, (9 Cir.) cert. den. 363 U.S. 803 (1960).

The Third Circuit rejected this approach contrary to Petitioner's view, stating:

> "Under American's first proposed standard of care the vessel would be relieved of liability to a longshoreman for unreasonably dangerous conditions on board ship whenever the stevedoring contractor failed to perform his tasks in an "expert and experienced" fashion. This would occur whether or not the individual longshoreman was personally at fault. The proposed rule thus imputes to the non-negligent longshoreman the negligence of his stevedore employer, and establishes that negligence as a complete bar to recovery against the vessel. This result is at variance with the Supreme Court's interpretation of the 1972 Amendments in *Edmonds* v. *Campagnie Generale Transatlantique, supra.* It is inconceivable to us that the Court, which disapproved a rule that imputes the negligence of the stevedore to the longshoreman to *reduce* his recovery against a negligent shipowner, would approve a rule barring all recovery against a negligent shipowner on the basis of imputed employer negligence." (124)

Barge owner, in *Griffith,* alternatively urged that the Court adopt the standard of care established in the Restatement of Torts, Second, Secs. 343-343A. The obvious intent there was to have the Third Circuit adopt the Traditional point of view of the Sections rather than the Modern view as set forth in *Napoli,* supra. The Court understood it to be so and referred to Comment (e), §343A (but see Comment (f)) and rejected the application of said Section because that would mean that a negligent invitee assumes the risk of injury. This would be contrary to the stated intention of Congress to abolish the doctrine of assumption of risk in these cases and have comparative negligence apply.

Perhaps more important as it affects the Petition here, the Circuit Court noted that:

> ". . . the same result would be reached whether one applied the Restatement §343 formulation or the more universal duty to exercise reasonable care under all the circumstances." (123)

This, of course, would be so if the Modern view as expressed in Napoli and Comment (f) of §343A were applied.

The Fourth Circuit has applied at times the Traditional concept of negligence which imputes stevedore's negligence to the longshoremen; charges plaintiff with assumption of risk and charges the stevedore with primary obligation to correct the dangerous condition relieving shipowner of its liability. This, however, is contrary to Congressional intent and contrary to the Supreme Court's decision in *Edmonds.* Perhaps more to the point is *Bess* v. *Agromar Line,* 518 F.2d 738 (4 Cir. 1975). There plaintiff claimed that shipowner breached its duty to provide suitable dunnage to be used in covering bales of cargo. The Circuit Court in effect held that if shipowner had the duty to furnish dunnage or to have someone there to make it available or there was the practice or custom in the trade for shipowner to provide the dunnage, the shipowner is liable for the results of failing to so provide same.

Even petitioner recognizes that if there is a duty to correct open and obvious conditions, there is liability for failure to correct same. (P. 12 of Petition.) In our case as hereinbefore set forth, shipowner did have a duty to correct the dangerous condition and failed to do so.

The Fifth Circuit still considers *Gay* v. *Ocean Transport & Trading Ltd.,* 546 F.2d 1233 (5 Cir. 1977) as the law to be followed. In that case the Court adopted the Modern rule as set forth in *Napoli.* It noted that the Traditional

rule is premised on the concepts of contributory negligence and assumption of risk which are inappropriate in 905(b) cases.

The Petition here finds the 'standard of reasonable care under the circumstances' as set forth in *Santos* v. *Scindia Steam Navigation Co., supra,* is not supported by legislative history or the various courts' opinions. Presumably the same objection would apply to the *Johnson* Opinion of the First Circuit and the *Griffith* Opinion of the Third Circuit. It is submitted that the three foregoing opinions make considerably more sense in the light of Congressional intent and in keeping with social progress. The archaic views expressed by all too many courts with involved explanations attempting to rationalize decisions that do not avoid harsh results should not be encouraged. Petitioner would have the clock turned back to the previous century.

Sufficient unto itself is the observation of the Court in *Santos,* 598 F.2d at 491, fn. 8, that the "standard of reasonable care under the circumstances is very similar to the standard set forth in the Restatement of Torts, Sec. 343 and 343A minus the limitations placed on recovery by Sec. 343(b) and 343A(1)." Had the District Court there not relied on the limiting provisions of said sections, the Circuit Court would have treated the law applied as harmless error.

The standard of care applied in our case is, therefore, not in conflict in result obtained if it were tried in the First, Third and Ninth Circuits. Nor would the facts in our case have resulted in a different verdict if tried in the Fourth and Fifth Circuits. The duty of shipowner to take corrective measures here not only arises from the standard of care applicable, but such duty stems from custom and practice in the Port of New York. There is testimony in our case showing such practice. Not only does

shipowner have such duties from the OSHA Regulations, but from the Safety Code promulgated by the shipping industry referred to in the Opinion of the Circuit Court in our case. What better way of establishing custom and usage in a trade than such industry-wide code.

Having violated its duty, shipowner could not shift its responsibility for the injuries that resulted by claiming the employer should have taken care of it. The Court in *Lopez* stated that there was no reason, as a matter of fundamental tort law, why it should not be held liable in damages for its own negligence.

> "It is well established tort law that "an actor whose negligence has set a dangerous force in motion is not saved from liability for harm it has caused to innocent persons solely because another has negligently failed to take action that would have avoided this." *Petition of Kinsman Transit Co.,* 338 F.2d 708, 719 (2d Cir. 1964), *cert. denied sub nom. Continental Grain Co.* v. *City of Buffalo,* 380 U.S. 944, 85 S.Ct. 1026, 13 L.Ed.2d 963 (1965)." (581 F.2d at 324)

III.

CONCLUSION

The issues raised by Petitioner claiming conflicting standards of care as a basis for the relief requested herein is a fictitious one. It has no bearing on the determination of our case on the facts in our case. The last sentence of the Petition (p. 23) reveals shipowner's purpose herein—namely, consolidation with other cases in which petitions have been granted, where the same "standard of care issue" is raised.

To support its position, shipowner changes the facts in our case and distorts the law. We are unaware that such approach has ever justified the granting of a Writ of Certiorari.

Petitioner's obvious desire to participate in a matter in which an appeal is pending could be achieved in some other way and should not involve our case in the manner pursued.

Every court, no matter what its view of the standard of care, would, on the facts here in evidence, sustain the verdict of the lower court. The decision of the Circuit Court, sought to be reversed, should be affirmed. Denial of the shipowner's Petition would effectively do just that.

It is, therefore, submitted that the Petition should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX 1

Pertinent Portion of the Charge to Jury

[197] * * *

Turning to the facts of this case, on February 1, 1977, the plaintiff, Sam Irizarry, was a dock man, employed by Sealand Terminals, Inc., a stevedoring company. As such, he was a harbor worker. I shall sometimes refer to him as a longshoreman.

In this suit he asserts a claim for damages which he alleges were caused by the negligence of the defendant Companhia Maritima Navegacion Netumar, S.A. The defendant which I will sometimes call the shipowner, denies that it was negligent or that it violated any duty it owed to plaintiff.

In addition, it claims that plaintiff caused or contributed to his own injury. Let us consider the plaintiff's claim.

In order to recover, the plaintiff must prove by a preponderance of the credible evidence that the accident occurred in the manner claimed by him, that the defendant was negligent and that its negligence was a proximate cause of plaintiff's accident. What is the negligence?

[198] Negligence is the doing of some act that a reasonably prudent person would not do or the failure to do something that a reasonably prudent person would do under the same or similar circumstances.

In other words, it is the failure to use ordinary care under the circumstances.

The prior fact that an accident happened to the plaintiff does not by itself make the shipowner liable to him. The plaintiff must prove by a preponderance of the credible evidence that an accident happened to him that was caused by the shipowner's negligence.

Appendix 1

The plaintiff claims that he was injured because the shipowner negligently failed to provide him with a safe place to work.

To sustain his claim he urges that the failure by the ship's crew to remove ice and melting slush from the top of a container on which the plaintiff was required to work caused him to slip and fall, thereby sustaining injuries. He claims that the shipowner had a duty to provide him with a safe place to work, that the shipowner breached its duty and that as a result he was injured.

He claims that the ship's first mate knew that there was ice and melting slush on the tops of containers which were being unloaded from the ship, and that [199] the shipowner should have had the ice and melting slush removed and that its failure to do so was negligence. In this case a violation of the shipowner's duty to supply Mr. Irizarry with a reasonably safe place in which to work.

The shipowner would be liable for unsafe working conditions of which it was or should have been aware and for any negligence by the ship's crew. To recover, the plaintiff must establish that the mate knew that ice and melting slush was on the top of the container on which the plaintiff alleges that he slipped and fell; and that the defendant negligently failed to have it removed, that the ice or melting slush had been on the top of the container for such a period of time that it should have been discovered and removed by the ship's crew in the exercise of reasonable care by the shipowner under the circumstances.

Plaintiff contends that prior to the accident, Mr. Esposito, a member of plaintiff's gang, advised the mate of the presence of ice on the containers, and that the mate shrugged and walked away.

Appendix 1

If you believe the testimony of Mr. Esposito in this regard, you may find that the shipowner knew that there was ice on the containers and its failure to remove the ice may be considered negligence for which the shipowner would be liable.

[200] You have heard me use the words "proximate cause." In order to show proximate cause, it is necessary for the plantiff to demonstrate that a chain of events flowed from defendant's claim of negligence and led to the damages which plaintiff seeks to recover, a chain of events unbroken by any other event for which the defendant is not liable.

If you find the shipowner negligent and that the shipowner's negligence was a proximate cause of plaintiff's accident, the shipowner would be liable whether or not you find that the plaintiff is also negligent. It is not a valid defense to a suit like this one to contend that the injured longshoreman assumed the risk of his employment if the injury resulted in whole or in part from the negligence of the shipowner.

Although a longshoreman never assumes the risk of injury from the negligence of another, it is a fact of common knowledge that in almost every occupation aboard ship there is some inherent and unavoidable risk which does not arise out of negligence.

A longshoreman when he enters upon his calling must assume all inherent and unavoidable risks of his occupation as all persons must and no person may recover for injuries resulting solely from such inherent and [201] unavoidable risks. Also, the shipowner is not liable merely because there has been an accident and a longshoreman has been injured. The shipowner is liable only if it has been negligent. If a longshoreman is injured as a result of the

normal hazards or risks of the business in which he is engaged without participation on the part of anyone else, he is not entitled to recover damages from the shipowner.

You heard counsel for the defendant contend that the plaintiff was himself negligent, and that the plaintiff's negligence caused his injury. This is a defense, and the burden of proving the plaintiff was himself negligent or as it is sometimes said, contributorily negligent is on the defendant. But the fact that the plaintiff's acts may have contributed to causing his accident in an injury, does not by itself prevent his recovery of damages. In suits like this one, you are required to find whether the plaintiff was guilty of what we call contributory negligence, and if so, what percentage his contributory negligence contributed to the accident, but this does not prevent his recovery. It only reduces the amount.

* * * * *

[208] Mr. Lassoff: But they won't know necessarily it's a stipulated fact.

Mr. Delaney: He said it was stipulated.

The Court: I think I just said that the parties stipulated as to medical expenses. I don't believe I did give the amount. I will do that, because you did so stipulate.

Are there any requests for supplementary instructions, Mr. Lassoff?

Mr. Lassoff: No, sir.

The Court: Very well. Mr. Delaney, are there any questions?

Mr. Delaney: The defendant has no exceptions, your Honor. The only further request to charge is that with regard to the shipowner's duty to provide plaintiff with a safe place to work that this—the shipowner does not owe

the plaintiff an absolute duty to provide a safe place to work and that consequently by employing the stevedore to discharge the vessel that the stevedore has certain responsibilities under the law which the shipowner has a right to assume that the stevedore will perform.

Mr. Lassoff: Your Honor, the plaintiff is not the stevedore. Whatever rights the ship has had against the stevedore, Congress has stated in the Edmonds v. Compagnie case it's too bad if the ship has to bear that [209] burden but it says the system devised by Congress did not intend to pass the economic loss of the stevedores negligence onto the longshoremen and that is what Mr. Delaney is trying to do.

The Court: I have had the opportunity to review the syllabus in Edmonds v. Compagnie General Transatlantic, decided by the Supreme Court on June 27, 1979.

As I read the Edmonds case, the liability and the question of the negligence of the shipowner stands on its own two feet. I think if I were to supplement my charge to the extent requested, it would not be correct as a matter of law and would be confusing upon the jury. I think I have set forth the law as it presently exists, and therefore I decline to supplement my charge.

Is there anything further?

Mr. Delaney: Nothing further. Just I would like to note my exception.

The Court: You have your exception.

The one thing I will do is to indicate to the jury that the parties have stipulated that the medical expenses were $1,545.

Is there anything further?

Mr. Delaney: No, your Honor.

Mr. Lassoff: No your Honor.